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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 62

HALCYON LINES AND VINKE AND COMPANY,
Petitioners,

vs.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent

MEMORANDUM FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

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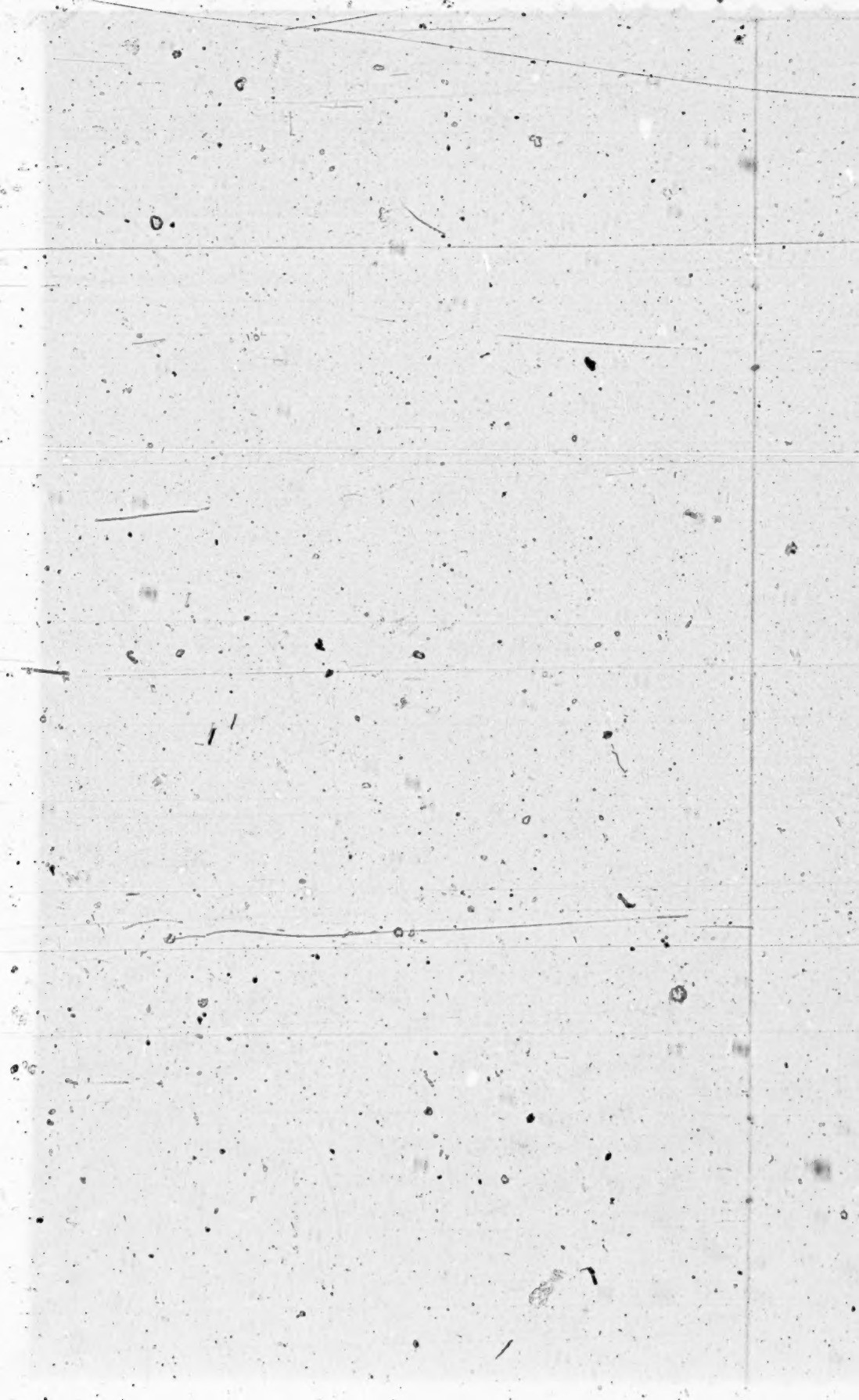

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is not a brief in opposition to the petition requesting that certiorari be granted. We would file no brief if it were not for the fact that our failure to do so might be construed as concurrence with some of the points and arguments made in the petition.

In support of the petition three points are alleged. They are:

A. There is conflict between the decision of the Court below and the language of this Court in *American Stevedores, Inc.* v. *Porello,* 330 U.S. 446. (Petition, page 8, paragraph 2)

B. The formula for contribution framed by the Court below suggests no machinery for liquidating the amount of contribution and is generally unworkable under the existing statute, 33 U.S.C.A. 1300 et seq.

C. There is conflict among the Circuits.

We will comment on these points briefly.

A. There Is No Conflict Between the Decision of the Court Below and the Language of This Court in American Stevedores, Inc. v. Porello, 330 U. S. 446.

There is no conflict between the decision below and the language of this Court in *American Stevedores, Inc.* v. *Porello, supra.* In the *Porello* case this Court was discussing the interpretation of a contract. We agree that a general rule of law may be modified by statute or contract, but that argument has no place in this case where no contractual provision touched the subject and no statute, state or federal, controlled or touched upon it.

B. The Formula for Contribution Framed by the Court Below Suggests No Machinery for Liquidating the Amount of Contribution and Is Generally Unworkable under Existing Statutes.

We fully agree with the statement (Petition, page 8, paragraph 3) that the decision below sets up no procedure for liquidation of the amount due one entitled to contribution from an employer by reason of any injury sustained by one of his employees. In some situations it would be impossible to determine the amount of the employer's contribution. In the remaining situations the Court of Appeals' decision neither prescribes nor suggests any workable rule.

It seems strange that neither the Court below nor the Petitioner mention the fact that what the Court below has

done in the instant case is to apply to Maritime Law and the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 1300 et seq.) the rule which the Pennsylvania Supreme Court, by its decision in *Maio* v. *Fahs*, 339 Pa. 180, has applied to common law actions and the Pennsylvania Compensation Act, 77 Purdon's Statutes 411 et seq.

What may be a workable procedure under the Pennsylvania Compensation Act will not and cannot operate successfully under the Longshoremen's and Harbor Workers' Compensation Act because of the fundamental differences, substantive and procedural, between the two Acts.

C. There Is Conflict Among the Circuits

We concede conflict between the decisions by the Court of Appeals for the Second Circuit and that by the Court of Appeals for the Third Circuit in the instant case. On the *amount* of contribution which may be recovered by an original defendant from his co-defendant, who is also the employer of the plaintiff in a personal injury suit, there is conflict among the Second, Third and Ninth Circuits. We deny that the Ninth Circuit Court of Appeals was dealing with the same problem as were the Court of Appeals for the Third Circuit in the instant case and the Court of Appeals for the Second Circuit in *American Mutual Liability Insurance Company* v. *Matthews*, 182 F. 2nd 322. We respectfully suggest that only the Ninth Circuit actually recognized and decided the real problem which pervades all cases of this type.

The confusion which exists is probably underscored by the conflict within the Third Circuit Court of Appeals on the question of the *amount* of the recovery which may be had against the employer. The Third Circuit says in our case that the employer must respond to the amount of the

workmen's compensation payable, yet Chief Judge Biggs of the Third Circuit sat by special designation in the Court of Appeals for the Ninth Circuit when it decided *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2nd 181. Chief Judge Biggs concurred in the decision holding the employer liable to pay indemnity in an amount which far exceeded its possible liability under the Compensation Act.

We respectfully suggest that the confusion in the lower courts extends further than the confines of the problem presented by the petition herein. We suggest that it results from misapprehension of some of the fundamental concepts of the law of torts. The problem and the confusion cannot be clarified by the simple application of labels such as "joint tort feasor", "liability in solido", or "mutual wrong doers."

Unfortunately it is such "solution by label" which has been adopted by the Courts of Appeal for the Second and Third Circuits.

This Respondent is preparing a cross-petition for certiorari, the time for filing which was extended to July 20, 1951 in an Order signed by Mr. Justice Burton on May 11, 1951.

We suggest that all facets of the problem should be considered together before there are any more lower court decisions attempting to solve an over-all problem on a piecemeal basis.

Conclusion

The Respondent does not oppose the application for a writ of certiorari in this case although it urges that the over-all problem cannot be solved satisfactorily unless this Court will also grant certiorari on the petition of Haenn Ship Ceiling and Refitting Corporation and by its decision in the two cases points out to the lower courts the distinc-

tion between primary and secondary liability based upon the breach of a primary duty and the breach of a duty which is but secondary.

Respectfully submitted,

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